# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 29, 2014 |
| v | No. 310648<br>Wayne Circuit Court |
| EDWARD CHARLES-MONTIQUE HICKS,<br><br>Defendant-Appellant. | LC No. 11-005143-FC |

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

After two trials ended in hung juries, defendant was convicted of conspiracy to commit first-degree murder, MCL 750.157a, MCL 750.316(1)(a) at a third trial. The jury acquitted defendant of first-degree murder. MCL 750.316(1)(a). Defendant was sentenced to life imprisonment. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm defendant's conviction and remand for correction of the judgment of sentence.

## A. FACTS

Defendant's conviction arises out of the murder of his mother Marion Harris who was shot to death in the middle of East Grand Boulevard on the morning of April 14, 2011, as she walked across the street from her apartment complex to catch a bus to work. Defendant was the primary beneficiary of Harris' $50,000 life insurance policy.

Sometime before the murder, in April 2011, Donald Lucas regularly walked by Harris' apartment complex in the morning as part of his exercise regime. On two occasions before the shooting, Lucas saw a tall man and a short man standing at the corner of East Grand Boulevard and Congress near the apartment complex. The men were African American and appeared to be in their twenties. Lucas stopped his morning walks after seeing the men because he was uncomfortable. Shortly after the shooting, in a police photograph array, Lucas identified defendant as the tall man he saw.

On April 14, 2011, at 7:10 a.m., Sabrina Lee finished her shift at a nursing home located across the street from Harris' apartment complex. Lee gathered her things and went and sat on the porch of the nursing home. The porch faced the apartment complex that was approximately 10-15 feet away. As Lee sat on the porch, she noticed a short man pacing by a fence near the nursing home. Lee did not see the man's face, but she recalled that he wore black pants and a

black hooded sweatshirt. A few minutes later, Lee saw a woman walk out of the front of the apartment building, down the stairs, and across the street. At the same time, the man in the hooded sweatshirt walked toward the woman and met her near the median. When the man was less than a foot away, he pulled a handgun from his pocket and fired three shots at the woman and she fell to the ground. Lee got up and ran back to the entrance of the nursing home; when she looked back, she saw the man fire two more shots into the victim's head then run away. Police later identified Harris as the victim.

Daniel Brooks testified that his cousin Carl "CJ" McIntire was good friends with defendant. McIntire was 5-foot-3-inches tall. Brooks testified that he used to spend a lot of time with defendant, whom he referred to as "E." On one occasion, according to Brooks, defendant stated that, while he would not kill Brooks for money, "I'll get my mama killed." Brooks testified that on the night of April 14, 2011, defendant called him and offered to pay him $2,500 to drive him somewhere; Brooks declined.

Davita Williams dated McIntire during the months preceding the murder. Davita lived with her mother Rovita Williams and McIntire often frequented the Williams' home. Davita testified that she met defendant on several occasions and she knew defendant as "E." McIntire often drove defendant places because defendant did not have a car. Davita testified that in April 2011, McIntire told her of a plan to kill defendant's mother. McIntire told Davita that defendant asked him to shoot his mother and make it look like a robbery. McIntire said that he would receive $25,000 for the shooting. On the day of the murder, McIntire told Davita that he waited for the victim then shot her in the street. Later that day, McIntire was at the Williams home when defendant called him on Rovita's cell phone. Davita turned the phone on speaker phone and gave it to McIntire. Davita listed to the phone conversation and she heard defendant say that he was getting a suit for his mother's funeral; defendant then asked McIntire if he had seen the news. When McIntire responded that he had seen the news, defendant stated, "thanks."

Rovita testified that on April 18, 2011, she drove McIntire and Davita to an empty lot. McIntire told Rovita where to stop the car, and then he exited and ran into the field and retrieved a large silver handgun. McIntire ran back to the car carrying the handgun. When he entered the car, Rovita asked, "who did you kill?" Rovita testified that Davita responded to her question by stating "CJ killed E's mother." McIntire agreed and stated, "he's supposed to be paying me $25,000 for doing it." However, Davita testified that McIntire responded to Rovita's question by admitting that he killed defendant's mother.

Defendant was charged with first-degree murder and conspiracy to commit first-degree murder. Two trials ended in hung-juries. At the third trial, the parties stipulated that defendant was the primary beneficiary of his mother's $50,000 life insurance policy and that McIntire was "deceased." Investigator Donald Olsen, of the Detroit Police Department, testified at trial. Olsen interviewed defendant on May 11, 2011, where he gave defendant a question-and-answer form to fill out. On the form, defendant admitted that he and McIntire went to the area near Harris' apartment two to three days before April 14, 2011, to obtain a key to a post office box.

Defendant was convicted of conspiracy to commit first-degree murder and acquitted of first-degree murder; he was sentenced to life imprisonment. This appeal ensued.[1]

## B. ANALYSIS

### I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises multiple claims of ineffective assistance of counsel. "A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011) (internal citations omitted). Because the trial court did not hold a *Ginther*[2] hearing, our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was (1) deficient on an objective standard of reasonableness and (2) "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant contends that trial counsel failed to present a substantial defense because he failed to, call, interview, or request production of three eyewitnesses. Defendant argues that the witnesses would have described the perpetrator as a 30-year-old African American man who stood 5-feet-8-inches tall and had a full beard. Defendant attaches two police reports to his brief in support of his argument. Defendant contends that these three eyewitnesses described an individual that did not look like McIntire because, according to defendant, McIntire was eight inches shorter, 10 years younger, and did not have facial hair. Defendant argues that the witnesses could have countered Davita's testimony that McIntire was the shooter.

In support of his argument, defendant cites two police reports that were not included in the lower court record. Generally, a party may not expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). However, even if we were to consider the police reports, defendant cannot show that counsel acted deficiently in failing to call the three eyewitnesses.

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[1] Initially, defendant was represented by appellate counsel and counsel filed a brief; however, defendant moved this Court to substitute his Standard 4 brief in place of counsel's brief and this Court granted defendant's motion. *People v Hicks*, unpublished order of the Court of Appeals, entered June 26, 2013 (Docket No. 310648).

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id*. "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation omitted).

Defendant cannot show that any of the witnesses would have offered testimony that favored the defense and made a difference at trial. It is unclear whether the witnesses would have offered testimony consistent with the descriptions in the attached police reports. Furthermore, even if the witnesses would have offered testimony consistent with the reports, the reports do not differ substantial with the evidence concerning McIntire's physical appearance. Specifically, Brooks testified that McIntire was 5-foot-3-inches tall; Rovita testified that McIntire was 5-foot-2-inches tall. These descriptions do not significantly differ from the height estimates contained in the police reports such that, even assuming the eyewitnesses would have testified consistent with the reports, defendant cannot show that their testimonies would have made any difference at trial. *Chapo*, 283 Mich App at 371.

Moreover, while defendant claims that McIntire did not have facial hair and was "10 years younger," there is nothing in the record to support those assertions. Instead, defendant appears to make factual assertions concerning McIntire's appearance based on his own personal knowledge. This is an improper attempt to expand the record and we will not consider them. See *Powell*, 235 Mich App at 561 n 4 ("it is impermissible to expand the record on appeal"). Further, Lucas testified that he saw defendant and a short man standing near the apartment complex sometime before the murder. Defendant admitted to police that he and McIntire were in the vicinity of the apartment complex sometime before the murders. Lucas estimated that both men were in their twenties. This estimate was not that different from the eyewitnesses' estimates that the perpetrator was between age 25 and 30.

In short, counsel did not deprive defendant of a substantial defense when he failed to call the additional eyewitnesses because defendant cannot show that their testimonies would have made any difference at trial. *Chapo*, 283 Mich App at 371. Accordingly, defendant was not denied the effective assistance of counsel or his right to a fair trial and due process. *Payne*, 285 Mich App at 190.

Next, defendant argues that counsel was ineffective in failing to call eyewitness Nikki Higgins to testify at trial. Defendant contends that Higgins previously testified that the perpetrator did not wear a ski mask, which he claims contradicted Davita's testimony concerning the mask. Defendant also argues that Higgins stated in a police report that the perpetrator was 5-foot-6-inches tall, while McIntire was only 5-foot tall. Finally, defendant contends that Higgins would have testified that she saw two men near the apartment complex prior to the murder, but Higgins would not have identified defendant as one of the men.

Defendant cannot show that counsel's failure to call Higgins was deficient on an objective standard of reasonableness. First, counsel had the opportunity to observe Higgins testify at the January 2012 trial. At that trial, Higgins explained that she previously saw the perpetrator near the apartment complex with a tall African American man during the week preceding the murder. Counsel could have decided not to call Higgins because her testimony aligned with Lucas' testimony that defendant was the tall man loitering at the apartment complex shortly before the murder. This was a reasonable strategic decision that we will not second-guess on appeal. *Garza*, 246 Mich App at 255.

Moreover, even if we were to assume that Higgins would have testified that the perpetrator stood 5'-6" tall, that evidence alone would not have cast significant doubt on the prosecution's theory that McIntire was the shooter. As noted above, two other witnesses estimated that McIntire stood between 5'-2" and 5'-3." If Higgins' testified and estimated that the shooter was 5'-6", a mere three inches taller, it would not have made a difference at trial. *Chapo*, 283 Mich App at 371.

With respect to defendant's argument that Higgins could have offered testimony to contradict Davita's testimony about whether the shooter wore a ski-mask, defendant's argument lacks merit. First, Davita did not state with certainty that McIntire wore a ski-mask; rather, she agreed that McIntire discussed "having some kind of hat with the eyes cut out." Second, the jury was informed that the perpetrator was not wearing a mask. Lee described what the perpetrator was wearing and she did not state that he wore a mask. Thus, the jury was free to consider that information in weighing Davita's credibility and counsel did not need to offer Higgins' cumulative testimony to belabor the point.

Finally, defendant's contends that Higgins could have testified that she saw two men near the apartment complex before the murder, but she would not have identified defendant as one of the men. Even if Higgins could not identify defendant, her testimony about a tall African American man would have aligned with Lucas' testimony that he saw defendant near the apartments before the murder. The testimony would not have made any difference at trial.

In short, defendant was not denied the effective assistance of counsel, a fair trial, or due process when counsel made a reasonable strategic decision not to call Higgins as a witness. *Garza*, 246 Mich App at 255.

Next, defendant argues that counsel was ineffective when he failed to impeach Davita with six prior inconsistent statements.

Decisions regarding how to cross-examine and impeach witnesses are matters of trial strategy, which we will not substitute our judgment for that of counsel. *People v McFadden*, 159 Mich App 769, 800; 407 NW2d 78 (1987); *Garza*, 246 Mich App at 255.

First, defendant contends that Davita testified at the preliminary examination that she did not tell anyone about the murder until after McIntire turned up missing on April 26, 2011. Defendant argues that Davita changed her testimony at the present trial when she testified that she told her mom about the murder when McIntire returned from the field with the gun.

Davita's trial testimony was not inconsistent with her testimony at the preliminary examination. Specifically, Davita testified that, after returning from the field with a gun, McIntire stated that he killed defendant's mother. Davita did not testify that she informed Rovita about the murder. There was no inconsistency between this testimony and the testimony defendant cites from the preliminary examination. Thus, defendant has failed to show that counsel acted deficiently. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not deficient for failing to advocate a meritless position).

Second, defendant argues that, prior to trial Davita told police that she did not know what McIntire did with the murder weapon, yet testified at trial that McIntire retrieved the gun from a field. Defendant contends that counsel should have impeached Davita at trial. Defendant's argument is devoid of merit because counsel did cross-examine Davita regarding her inconsistent statement to police regarding the murder weapon. Counsel was not deficient in this respect.

Third, defendant argues that Davita previously claimed that McIntire told her he wore a mask when he committed the murder, but at trial "there was no mention of [McIntire] wearing a mask." Defendant contends that information about the mask was important because eyewitnesses at an earlier trial offered testimony showing that the perpetrator did not wear a mask. Defendant's argument lacks merit.

At the September 2011 trial, Davita testified that McIntire told her that when he killed Harris he wore a mask that he made from a hat. At the present trial, Davita testified that when McIntire came over to her house on April 14, 2011, he was not wearing a hat but discussed with her "about having some kind of hat with the eyes cut out." Thus, contrary to defendant's argument, the jury was informed about McIntire's statement about the mask. Furthermore, when Lee described the perpetrator, she did not state that the perpetrator wore a mask. The jury was therefore free to consider Lee's description of the perpetrator without a mask and Davita's statement about the mask in weighing Davita's credibility. Counsel was not ineffective in questioning Davita about the mask.

Fourth, defendant contends that, at the September 2011, trial, Davita testified that McIntire did not tell her who "the target was." Defendant argues that Davita's testimony was inconsistent with her testimony in the present trial that the plot involved Harris. Defendant's argument lacks merit.

At the September trial, Davita testified that McIntire told her about his and defendant's plan to kill "defendant's mother." She stated that McIntire told her that defendant wanted to kill his mother to obtain the life insurance proceeds. Davita's reference to not knowing who the "target" was concerned her lack of knowledge about Harris' name. Specifically, Davita explained that she could not contact Harris to warn her of the plot because she did not know Harris' name or number. Davita did not waiver on her testimony that McIntire told her the plot involved defendant's mother. This was consistent with her testimony at the present trial and counsel was not deficient in failing to attempt to impeach Davita. See *Snider*, 239 Mich App at 425 (counsel is not deficient for failing to advocate a meritless position).

Fifth, defendant argues that Davita stated at a May 11, 2011 subpoena hearing that McIntire did not tell her how many times he shot the victim; however at trial, Davita testified

that McIntire stated that he shot the victim three times. Defendant contends that counsel should have impeached Davita with this prior inconsistent statement. Defendant cites to a subpoena hearing that is not part of the lower court record. By failing to cite facts from the record, defendant has abandoned the issue for review. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."). Moreover, this minor inconsistency would not have made any difference at trial.

Sixth, defendant argues that Davita offered inconsistent testimony at the present trial, the second trial (January 2012 trial) and the preliminary examination concerning the reasons why she did not inform police about the murder plot. Defendant contends that counsel should have cross-examined Davita about these inconsistencies.

Davita's testimony regarding why she did not go to police before the murder was consistent at both the January 2012 trial and the present trial. On both occasions she stated that she did not go to police because McIntire told her not to tell anyone. At the April 2012 trial she testified that she did not go to police after the murder because defendant was still on the streets. This was not inconsistent with her prior testimony because her prior testimony did not address why she failed to contact police *after* the murder. Although Davita's preliminary examination testimony differed, Davita's reasoning for why she did not go to police was not highly relevant and it would not have made a difference at trial. Counsel could have concluded that impeaching Davita in this instance would not have had any effect. Further, counsel would have potentially opened the door to allow the prosecutor to introduce prior consistent statements Davita made on the subject. See *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (in some circumstances prior consistent statements can be admissible at trial to bolster a witnesses credibility). In short, counsel made a strategic decision not to cross-examine Davita about a prior inconsistency concerning her reasons for not going to the police. Given that the line of questioning would not have made any difference at trial, counsel was not ineffective. *McFadden*, 159 Mich App at 800.

Next, defendant contends that counsel was ineffective for failing to introduce "hearsay evidence of prior contradictory statements" of Davita. Specifically, defendant argues that McIntire's uncle Theron Simpson stated that Davita told him that she had no knowledge of the murder. Defendant attaches a statement that Simpson made to police on April 26, 2011, wherein Simpson stated that McIntire's "girlfriend Britney" told him that McIntire "had done some kind of job with [defendant] but she didn't know what."

Defendant cannot show how a statement attributed to a "Britney" would have been admissible at trial to impeach Davita. There is no record evidence concerning who Britney was and defendant does not cite any record evidence to show that Davita was McIntire's only female friend. Instead, defendant would have this Court assume that Davita and "Britney" are the same individual. "A party is not permitted to enlarge the record on appeal by asserting numerous facts that were not presented at the trial court." *Kent Co Aero Bd v Dep't of State Police*, 239 Mich App 563, 580; 609 NW2d 593 (2000). Second, even assuming Davita and Britney are the same person, the mere fact that Davita may have told Simpson that she was unaware of the "job" defendant and McIntire were involved in would not have made any difference at trial. Davita

previously testified that she was reluctant to go to police after the murder because she was afraid of defendant. Her reluctance to inform Simpson about the plot was consistent with her assertion that she did not want to talk about the crime out of fear of retaliation. In short, counsel was not deficient in failing to call Simpson or introduce Simpson's statement. *Payne*, 285 Mich App at 190; *Chapo*, 283 Mich App at 371.

Next, defendant argues that counsel was ineffective when he failed to impeach Brooks to show his "bias against defendant." Specifically, defendant claims that, before trial, Brooks made a statement to police wherein he stated that his family received a call from an unidentified man claiming that defendant murdered McIntire and shot another of Brooks' cousins. Defendant contends that counsel should have introduced the statement to show bias.

Defendant cannot show that counsel's failure to introduce Brooks' police statement constituted deficient performance. Had counsel introduced Brooks' out-of-court statement, the jury would have learned that defendant was accused of murdering McIntire and that defendant previously shot another cousin. This would have allowed the jury to infer that defendant killed McIntire in an effort to conceal his involvement in Harris' murder and that defendant was generally a violent person who had a propensity to commit violent crimes. Thus, contrary to defendant's argument, counsel made a sound strategic decision to not introduce Brooks' statement and defendant was not denied the effective assistance of counsel, due process, or a fair trial. *Carbin*, 464 Mich at 600.

Next, defendant argues counsel was ineffective for failing to object when the prosecution called Dwayne Forest as a witness.

Forest testified that he was defendant's cell-mate at the Wayne County Jail. Forest testified that defendant did not talk about why he was in jail. However, at night, Forest heard defendant crying in his cell and saying "I miss you, I miss you." Forest asked defendant why he was crying and defendant explained "something happened to my mother." On direct exam, Forest denied that defendant admitted involvement in the incident with his mother and denied that defendant mentioned a person named "C.J." The prosecutor then questioned Forest as follows:

> *Q.* Did he ultimately tell you he had some involvement in that incident, involving his mother?
>
> *A.* No. He ain't never tell me nothing like that.
>
> *Q.* Do you remember giving a written statement?
>
> *Q.* Did he mention to you a person named C.J.
>
> *A.* Edward ain't mention nothing to me. I was just – I was going through his paperwork.
>
> *Q.* Sir, questions and answers. Did he mention a C.J.?
>
> *A.* No. He didn't mention a C.J.

*Q.* All right. I'd like to show you a statement; read it to yourself, the first page-and-a-half.

*A.* First of all, everything I told you I lied, because I went through his paperwork. That's where I got all of this from.

*Q.* Sir, read it yourself.

*A.* Read it to myself.

*Q.* All right. Did he say anything to you about a man named C. J., yes or no?

*A.* No.

The prosecution did not ask Forest any further questions and defense counsel did not cross-examine Forest.

On appeal, defendant argues that counsel was ineffective for failing to object when the trial court permitted Forest to testify. Defendant contends that the trial court determined that Forest's statement was involuntary after "talking to the informant privately in his chambers."

Counsel was not deficient for failing to object on grounds that Forest's statement was involuntary. First, there is nothing in the record to support defendant's assertion that the trial court spoke privately with Forest in his chambers. See *Kent Co Aero Bd*, 239 Mich App at 580 ("A party is not permitted to enlarge the record on appeal by asserting numerous facts that were not presented at the trial court.") Second, to the extent the trial court stated it previously ruled that Forest's statement was involuntary it clearly erred in doing so. Defense counsel initially moved to strike Forest based on the prosecution's discovery violation. On January 17, 2012, the trial court clearly held that it was barring Forest's testimony based on the prosecution's failure to turn over discovery materials in a timely manner. On January 19, 2012, the trial court mischaracterized its holding when it stated that it did not allow Forest to testify because it "found that it was not voluntarily made." There is nothing in the record to support that Forest's statement was involuntarily made and to the extent the trial court held otherwise, it clearly erred. Accordingly, counsel was not deficient in failing to object to Forest's testimony on involuntariness grounds. See *Snider*, 239 Mich App at 425 (counsel is not deficient for failing to advocate a meritless position).

Defendant also contends that the prosecution "unlawfully questioned [Forest] about his recanted statement." Defendant argues that Forest was not a hostile witness because the prosecution knew beforehand that Forest had recanted his statement. Therefore, according to defendant, the prosecution was not permitted to impeach Forest with his prior inconsistent statement. Defendant claims that counsel should have objected to the prosecution's improper attempt to impeach Forest.

Under MRE 607, "[t]he general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculpate the defendant."[3] *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). The exception to this general rule is that: "A prosecutor cannot use a statement that directly tends to inculpate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case." *Id*.

In this case, the prosecutor did not impeach Forest with his out of court statement. The prosecutor did not introduce any of the substantive content of the statement to impeach Forest's testimony. Rather, the prosecutor handed the statement to Forest and asked Forest to review the statement. In doing so, the prosecutor attempted to refresh Forest's recollection, which is permissible under MRE 803(5). Therefore, counsel was not deficient in failing to raise an objection because any objection would have been frivolous. See *Snider*, 239 Mich App at 425 (counsel is not deficient for failing to advocate a meritless position).

Moreover, counsel could have made the strategic decision not to object to any of Forest's testimony because he reasonably believed that it was favorable to the defense. Forest testified that defendant did not admit any involvement in the situation involving his mother and testified that defendant cried at night over the loss of his mother. Counsel could have reasonably concluded that this testimony tended to show that defendant's behavior was inconsistent with involvement in his mother's murder. As noted, we will not second-guess counsel on this type of strategic decision. *Garza*, 246 Mich App at 255.

In sum, counsel was not deficient on an objective standard of reasonableness when he failed to object to Forest's testimony and defendant was not denied the effective assistance of counsel or a fair trial. *Toma*, 462 Mich at 302.

Defendant next argues that counsel acted deficiently in responding to an unsolicited remark that Brooks made during his testimony. During cross-examination, Brooks testified as follows:

> *Q.* Have you ever seen [McIntire] kill somebody, sir?
>
> *A.* No.
>
> *Q.* Now—
>
> *A.* I've seen him torturing people; I've seen that.

[3] Defendant cites *People v White*, 401 Mich 482; 257 NW2d 912 (1977), to support the proposition that the prosecution cannot impeach its own witness absent unexpected hostility. *White* is inapplicable in that it applied the former rule which generally precluded a party from impeaching its own witness. *Id*. at 508. However, under the current rule, MRE 607, the prosecution may impeach its own witness. See *Kilbourn*, 454 Mich at 682.

*Q.* Okay.

*A.* He done burned people.

*Q.* Okay. Have you ever seen him kill somebody sir, yes or no?

*A.* No.

*Q.* You said you saw him torture somebody?

*A.* Yes.

*Q.* Did you report that to the police, sir?

*A.* No, because I was scared for my life.

*Q.* You were scared of your own cousin, Mr. McIntire?

*A.* Actually, he ain't my—

*Q.* No, I'm talking about Mr. McIntire.

*A.* Was I scared of my own cousin? No. Why I'm going to be scared of him for?

*Q.* Well, I asked you have you ever seen Mr. McIntire kill anybody?

*A.* No. No. I never seen him do anything.

*Q.* Now—

*A.* I never seen him—like I said, all he did was went to work. That's all he did. I don't even think he got a record. *But your client, I done seen him torturing people.*

*Q.* I didn't ask you that, sir.

*A.* Okay. Well—[(emphasis added).]

At that point, counsel requested that "the response be stricken," and the trial court agreed, stating, "It will be stricken." Counsel did not request an additional curative instruction and defendant claims this amounted to ineffective assistance.

Defendant cannot show that counsel was objectively unreasonable when he did not request additional instructions. Brooks' commentary was improper, but it was isolated and counsel immediately requested that the trial court strike Brooks' response and the court agreed. Had counsel requested additional curative instructions, counsel would have reminded the jury about the inappropriate comments. Counsel could have reasonably concluded that it was better not to remind the jury about the comments. See e.g. *People v Bahoda*, 448 Mich 261, 287 n 54;

531 NW2d 659 (1995) (noting that "there are times when it is better not to object and draw attention to an improper comment."). Nevertheless, even assuming that counsel acted deficiently in failing to request additional instructions, defendant cannot show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

In this case, the improper commentary was isolated and the trial court immediately granted counsel's request that the answer be stricken from the record. In addition, the trial court instructed the jury that defendant was presumed innocent, and jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Furthermore, there was substantial evidence of defendant's guilt such that the statements did not impact the outcome of the proceeding. Specifically, a witness testified that he saw defendant standing with a short man near the apartment complex shortly before the day Harris was shot by a short man. Witnesses testified that McIntire was short. This supported the prosecutor's theory that defendant and McIntire were scoping the area in preparation for the murder and it reinforced Davita's testimony that McIntire and defendant planned the murder. Additionally, defendant was the primary beneficiary of the victim's $50,000 life insurance policy, which showed defendant had motive to commit the crime. See *id*. at 223 ("Although motive is not an essential element of the crime, evidence of motive in a prosecution for murder is always relevant. . . .") Further, evidence of the life insurance policy tended to lend credence to Davita's testimony that defendant offered to pay McIntire $25,000 for the murder in that it showed defendant had reason to believe he would have funds to pay McIntire. Moreover, Brooks testified that defendant called him on the evening of the murder and offered to pay him $2,500 for a ride. This would allow the jury to infer that defendant wanted to flee the area. See *id*. at 226 (flight can be evidence of consciousness of guilt). Finally, Davita heard defendant thank McIntire after McIntire stated that he saw the news on the day of the murder and Davita offered detailed testimony about how McIntire informed her about the plot to murder Harris. As discussed below, that evidence was admissible. In sum, on this record, defendant cannot show that but for counsel's failure to request additional curative instructions there is a reasonable probability that the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

Defendant also contends that counsel was ineffective when he failed to "move to protect defendant in regards to Investigator Olsen and the prosecution continuously insinuating that [defendant] was responsible for the murder of [McIntire]." Defendant focuses on the following evidence. Davita testified that she last saw McIntire on April 21, 2011, when he told her that he was going out of town with defendant. Davita testified that McIntire did not receive any money from defendant. When the prosecutor asked her if she was surprised not to see McIntire again, Davita stated "yes."

With respect to Olsen, during cross-examination, defense counsel questioned Olsen about why he failed to investigate the phone records of one of McIntire's acquaintances. Olsen responded that the records were "going to be in conjunction with C. J.'s death. . . ." Defense counsel interrupted Olsen and asked "no one's been charged with C. J.'s death?" Olsen responded, "That's correct." On redirect exam, the prosecutor questioned Olsen as follows:

> *Q.* You were asked a question by Mr. Blake about investigating C. J., death [sic]; did C. J. die of natural causes or otherwise?

*A.* Otherwise.

*Q.* What's otherwise?

*Trial Court:* Otherwise is fine.

The prosecutor's questioning of Davita and Olsen about the circumstances surrounding McIntire's death was improper. The witnesses' responses, when combined, potentially allowed the jury to infer that defendant killed McIntire in an effort to cover up his involvement in the murder. This was improper and risked undermining the purpose of the stipulation that McIntire was deceased. A curative instruction may have alleviated potential prejudice. However, defendant cannot show that, but for counsel's failure to request an instruction there is a reasonable probability that the result of the proceeding would have been different. *Carbin*, 463 Mich at 600. Here, the improper testimony was isolated and defense counsel may not have wanted to draw additional attention to it and Olsen agreed that no one had been charged in connection with McIntire's death. Furthermore, as noted above, the trial court instructed the jury that defendant was presumed innocent and there was substantial other evidence of defendant's guilt including a detailed account of the planning and execution of the murder.

## II. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct when he only called one of the five eyewitnesses to the murder. Defendant's argument is devoid of merit.

Under MCL 767.40a, a prosecutor has an "obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). However, a prosecutor does not have an obligation to produce all known res gestae witnesses at trial. *Id*.

In this case, defendant does not dispute that the prosecutor notified the defense of all known res gestae witnesses and provided a list of witnesses who might be called at trial. Had any of the four res gestae witnesses had valuable information for the defense, defense counsel could have called the witnesses at trial. In sum, the prosecutor did not commit misconduct and defendant was not denied due process or a fair trial.

## III. ADMISSION OF CUSTODIAL STATEMENT

Defendant contends that multiple constitutional errors arose from the admission of the statement he made to police. We review unpreserved constitutional issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Olsen testified that he interviewed defendant. During the interview, defendant wrote out responses to written questions. Defendant's written statement was introduced at trial. In the statement, defendant agreed that he and McIntire were in the vicinity of the apartment complex at Congress and East Grand Boulevard prior to April 14, 2011 on two or three different days to obtain a key to a post office box from his mother. Defendant stated that it took two or three days to get the key because his mother was not there on the first two days. Defendant explained that

he did not wait for his mother at the apartment complex because "someone was after me." Defendant stated that he last talked to McIntire on "the 20th or the 21st." Defendant stated that his mother did have a life insurance policy. Defendant refused to sign the statement.

Before the first trial, defense counsel moved to suppress defendant's statement and the trial court held a suppression hearing. At the hearing, Olsen testified that he interviewed defendant at the police department after defendant was taken into custody. Olsen testified that he gave defendant his *Miranda*[4] rights and defendant waived his rights and agreed to talk. Defendant did not ask to stop the interview or request a lawyer. Olsen agreed that he did not interview defendant in a room "on the second floor where you have the video cameras," but he stated that all of the rooms had recording devices. After Olsen testified, the court held a sidebar and stated as follows:

> [T]he existence of a video is something that is new . . . We will adjourn this. The People have indicated that they'll supply [defense counsel] with a copy of that video. And then if further testimony is needed or if we just need to conclude with closing summations, we will do that at the appropriate time.

Thereafter, the trial court did not hold any further hearings or issue a ruling on defendant's motion to suppress and the parties proceeded to trial. Defendant contends that the trial court violated his constitutional rights and that counsel was ineffective.

After the initial suppression hearing, defense counsel failed to take any action in pursuit of the motion to suppress; in failing to take action, counsel abandoned the motion. See *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979) (noting that the defendant abandoned a motion to suppress by failing to "follow through on the motion and request an answer on it from the court."). Because counsel abandoned the motion, the trial court did not violate any of defendant's rights by failing to continue the hearing and by allowing the trial to proceed.

In addition, defense counsel was not ineffective for abandoning the motion to suppress. Counsel could have decided to use defendant's statement as part of a trial strategy to explain why defendant was in the vicinity of the apartment complex with McIntire sometime before the murder. During his opening statement, counsel discussed the evidence and he called defendant's grandmother to testify that Harris had a key to a post office box and that defendant did not have a key or a cell phone. Counsel used this evidence to support his theory that defendant was not at the apartment complex to "scope out the place." Furthermore, counsel could have reasonably concluded that the remaining portions of the statement were not prejudicial. While defendant acknowledged that his mother had a life insurance policy, the jury was already aware of the life insurance and the remaining portions of the statement were not prejudicial. In short, defendant has failed to show that counsel's performance fell below an objective standard of reasonableness when he did not pursue the motion to suppress. *Toma*, 462 Mich at 302.

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[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant argues that counsel should have raised a due process claim because the prosecution lied about the existence of the recording and about its whereabouts.

"A criminal defendant can demonstrate that the state violated his or her due process rights under the Fourteenth Amendment if the state, in bad faith, failed to preserve material evidence that might have exonerated the defendant." *People v Heft*, 299 Mich App 69, 79; 829 NW2d 266 (2012). "If the defendant cannot show bad faith or that the evidence was potentially exculpatory, the state's failure to preserve evidence does not deny the defendant due process." *Id*.

In this case, there is nothing in the record to support that the prosecution acted in bad faith to conceal a recording of the police interrogation or that the recording was potentially exculpatory. *Id*. Instead, Owens testified that there was no recording because the interview did not record properly. Necessarily, a prosecutor cannot produce evidence that does not exist. Moreover, as discussed above, defendant's statement was not prejudicial and counsel used it to further the defense. Thus, defendant cannot show that a recording would have been of any benefit. In short, counsel was not ineffective in failing to raise a due process claim because there was no due process violation. See *Snider*, 239 Mich App at 425 (counsel is not deficient for failing to advocate a meritless position).

Defendant also contends that Olsen violated his Fifth Amendment rights by testifying that defendant made a statement even though defendant asked for an attorney and refused to sign the statement. This argument is devoid of merit.

It was not improper for Olsen to testify that defendant made a statement simply because defendant did not sign his written statement. An officer need not obtain a signature to testify that an accused made a statement. Furthermore, even if we were to assume that defendant requested counsel before he wrote out responses to Olsen's questions, defendant is not entitled to any relief because he cannot show plain error that affected his substantial rights. *Carines*, 460 Mich at 763-764. As discussed above, counsel used defendant's statement to benefit the defense and the jury was already aware that defendant was the beneficiary of Harris' life insurance policy. Admission of the statement did not affect the outcome of the proceeding. *Id*.

In sum, admission of defendant's statement did not violate his constitutional rights.[5]

## IV. ADMISSION OF CO-CONSPIRATOR'S STATEMENTS

Defendant contends that the trial court abused its discretion and violated his due process rights by admitting McIntire's hearsay statements implicating him in the crime.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its

[5] In his question-presented, defendant cites the Fourth Amendment; however, defendant did not develop an argument related to the Fourth Amendment. Therefore, he abandoned that issue for review. See *Kelly*, 231 Mich App at 640-641.

decision falls outside the range of principled outcomes." *Id*. (citations and quotations omitted). We review de novo preliminary questions of law including whether evidence is admissible under the rules of evidence. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). Similarly, whether admission of evidence violated a defendant's constitutional rights involves a question of law that is reviewed de novo. *Unger*, 278 Mich App at 242.

The trial court admitted McIntire's out-of-court statements under MRE 804(b)(3), over defendant's MRE 403 objection. Defendant argues the trial court abused its discretion in admitting the evidence.

Hearsay is inadmissible as substantive evidence unless it falls within an exception. MRE 802. MRE 804(b)(3) provides an exception for statements made by an unavailable witness that are against his or her penal interest in relevant part as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

"The exception is based on the assumption that people do not generally make statements about themselves that are damaging unless they are true." *People v Washington*, 468 Mich 667, 671; 664 NW2d 203 (2003).

In *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993), overruled in part on other grounds, *People v Taylor*, 482 Mich 368; 759 NW2d 361 (2008), our Supreme Court addressed the admissibility of an out-of-court statement that implicates both the declarant and an accomplice. The Court held that such statements were admissible against the accomplice, explaining:

> where . . . the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement-including portions that inculpate another-is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). [*Id*. at 161.]

In *Taylor*, 482 Mich at 379-380, the declarant made a telephone call to an acquaintance during which he made statements that implicated himself and an accomplice in a murder. In a second telephone call, the declarant made statements that only implicated the accomplice. *Id*. This Court held that both statements were admissible under MRE 804(b)(3) because they were part of a narrative or events that was against the declarant's penal interest. *Id*. Our Supreme Court affirmed, explaining:

> the second statement was part of a pattern of impugning communications volunteered spontaneously and without reservation to a friend, not delivered to police, and without any apparent secondary motivation other than the desire to maintain the benefits of the relationship's confidence and trust—and according to

> the record, to brag. Accordingly . . . [the declarant's] statements . . . constituted a 'narrative of events,' so the statements were admissible at trial in their entirety. [*Id*. at 380 (quotations and citations omitted).]

McIntire's statements implicating himself and defendant in the crime were admissible under MRE 804(b)(3). Here, like in *Taylor*, McIntire's statements were part of a narrative of "impugning communications, volunteered spontaneously and without reservation to a friend." *Taylor*, 482 Mich at 380 (quotation omitted). The statements had indicia of reliability in that McIntire did not make the statements to police and there was no other apparent secondary motivation other than McIntire's desire to brag. McIntire initiated the narrative by informing Davita about the plot and then repeatedly added to the narrative when he "kept talking about" the plot. After the murder, McIntire described how he killed Harris by lying in wait and then shooting her in the street. McIntire then continued his narrative after returning to Rovita's car with the gun. The statements, as a whole, were clearly against McIntire's penal interest in that they subjected him to criminal liability for the murder and they were therefore admissible under MRE 804(b)(3). *Poole*, 444 Mich at 161; *Taylor*, 482 Mich at 380.

Additionally, the probative value of the statements was not "substantially outweighed by the danger of unfair prejudice" under MRE 403.

> An analysis under MRE 403 requires balancing several factors . . . which include the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*People v Eliason*, 300 Mich App 293, 302; 833 NW2d 357 (2013) (citations and quotations omitted).]

In this case, there was no concern over time and delay related to the presentation of the evidence. The evidence was not needlessly cumulative and it tended to directly prove an essential fact for which it was offered. Specifically, the evidence was highly probative in that it tended to prove that defendant and McIntire were responsible for planning and executing the murder of Harris. The evidence was therefore directly probative of the ultimate issue in this case—i.e. defendant's guilt or innocence. Finally, the evidence was not confusing or misleading and there was no other evidence directly on point. While the evidence certainly was damaging to the defense, "[t]he mere fact that evidence is damaging to a defendant does not make the evidence *unfairly* prejudicial." *Id*. (emphasis in original).

In sum, the trial court did not abuse its discretion in admitting McIntire's statements under MRE 804(b)(3) and defendant was not denied due process or a fair trial.

## V. DIRECTED VERDICT

Defendant argues that the trial court erred in denying his motion for directed verdict at the close of the prosecution's proofs.

We review de novo a trial court's decision on a motion for a directed verdict. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). In conducting this review, we consider "the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

"Criminal conspiracy is a mutual understanding or agreement between two or more persons, expressed or implied, to do or accomplish some criminal or unlawful act." *People v Hamp*, 110 Mich App 92, 102; 312 NW2d 175 (1981). "[T]he gist of the offense lies in the unlawful agreement between two or more persons to do the unlawful act." *Id*. The defendant must both intend to combine with others and intend to accomplish the illegal objective, *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001), and the "offense is complete upon the formation of the agreement." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). "Direct proof of a conspiracy is not required; rather, proof may be derived from the circumstances, acts, and conduct of the parties." *Id*. (quotations and citations omitted).

In this case, the illegal object of the conspiracy was to commit first-degree premeditated murder, which is the "intentional killing of a human . . . with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). As discussed above, there was significant evidence of defendant's guilt in this case such that a rational juror could have concluded beyond a reasonable doubt that defendant was guilty of conspiring with McIntire to murder Harris. While defendant claims that Davita's testimony was not worthy of belief, the jury was free to consider inconsistencies in the testimony and "[w]e do not interfere with the jury's assessment of the . . . credibility of witnesses." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). The trial court did not err in denying a directed verdict.

## VI. JUDGMENT OF SENTENCE

Finally, defendant contends that remand for correction of the judgment of sentence is necessary because the judgment states that he was sentenced to "natural life" imprisonment and because it does not list the proper MCL/PAAC codes.

At sentencing, the trial court sentenced defendant to the mandatory life imprisonment. The judgment of sentence states that defendant was convicted by jury of "Murder First Degree Premeditated (Conspiracy)," and it lists the charging MCL/PACC Code as "750.316-A(C)." The JOS provides that defendant is sentenced to "natural life" imprisonment.

Defendant argues that the "natural life" sentence precludes any possibility of parole and the prosecution agrees that the judgment should be corrected to state that defendant is sentenced to "life" imprisonment. The parties are correct that a life sentence for conspiracy to commit first-degree premeditated murder does not preclude the possibility of parole. See *People v Jahner*, 433 Mich 490, 493; 466 NW2d 151 (1989). Accordingly, remand for correction of the judgment of sentence to reflect that defendant was sentenced to "life" imprisonment is appropriate.

Defendant also contends that the charging/PACC code is incorrect. The judgment lists the MCL/PACC code as "750.316-A(C)" and that defendant was convicted of "Murder First

Degree Premeditated (Conspiracy)." MCL 750.157a proscribes conspiracy "to commit an offense prohibited by law" and MCL 750.316(1)(a) proscribes first-degree premeditated murder. Given that defendant was charged and convicted under MCL 750.316 and MCL 750.157a, on remand, the trial court should correct the judgment of sentence to add the code for conspiracy.

Affirmed and remanded for correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly